No. 83 365

IN THE

Supreme Court of the United States

October Term, 1983

IN RE DAVID PELTON MOORE, BY
MICHAEL R. P. MOORE AND BARBARA R. P. MOORE,
Petitioner.

PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Questions Presented

1. Should the judges of the newly-created Court of Appeals for the Federal Circuit (hereinafter "CAFC") reenter judgment for the purpose of allowing petitioner to seek relief in this Court when notice to counsel of the CAFC's decision was not mailed to counsel until after the statutory ninety day period for filing a Petition for a Writ of Certiorari had expired?

2. Should the judges of the CAFC provide reasons for their decision to affirm a Trial Judge's decision in a multi-issue case?

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Opinions Below

The decision and opinion of the CAFC, dated January 4, 1983, is unpublished and reprinted in Appendix A. A petition for rehearing and suggestion for rehearing en banc was denied on February 9, 1983. That decision is reprinted in Appendix B. A motion to reenter judgment was denied in an Order dated June 6, 1983 which is reprinted in Appendix C.

Jurisdiction of the Court

This petition is submitted pursuant to 28 U.S.C. §1651 (a) requesting this Court to order the CAFC to vacate its decisions dated January 4, 1983; February 9, 1983; and June 6, 1983 and enter a decision on petitioner's appeal which is supported by reasons.

Persons Against Whom Relief Is Sought

Howard T. Markey, Chief Judge of the CAFC; Giles S. Rich, Associate Judge of the CAFC; and Oscar H. Davis; Associate Judge of the CAFC.

Statement of the Case

This patent infringement litigation against the United States commenced in 1973. Like many patent infringement cases, it is both legally and factually complex.

Petitioner prevailed in an initial separate trial on certain validity issues. *See Moore* v. *United States,* 194 USPQ 423 (Ct. Cls. 1977). There then followed an infringement trial; defendant prevailed on the infringement issue. 211 USPQ 800 (Ct. Cls. 1981). The Trial Judge's decision on the infringement question was appealed to the CAFC.

The appeal was based on four purely legal issues, any one of which, if decided favorably to petitioner, could require a reversal. Several of the issues were of first impression to the patent bar. Others must have been decided,

petitioner submits, directly contrary to CAFC precedent in order for the CAFC to reach the result it did.[1]

Petitioner cannot determine the applicable law applied by the CAFC in reaching its decision since the CAFC did not provide the reasons for its decision. The CAFC "opinion" (*see* Appendix A) on the appeal of this complicated case comprises only four sentences. This third sentence states, in effect, that the CAFC does *not* adopt the Trial Judge's opinion. Petitioner requested the CAFC, via a petition for rehearing, to provide reasons for the decision. That petition was denied (*see* Appendix B), again without reasons. To complicate matters even further, the denial of the petition for rehearing was not timely served on counsel for the parties. Petitioner discovered that the petition had been decided only when petitioner's counsel telephoned the CAFC Clerk's office. Unfortunately, the parties did not receive notice of the denial of the petition until *after* the expiration of the ninety day period in which to file a Petition for Writ of Certiorari in this Court. Petitioner moved the CAFC to reenter judgment but that motion was denied (*see* Appendix C), again without reasons.[2]

The instant Petition for Writ of Mandamus requests this Court to compel the CAFC to: (1) reenter judgment

1. An understanding of the substantive facts and patent law issues in the case is not needed to decide the instant petition, however.

2. Petitioner did not receive a copy of the denial notice until after the expiration of the ninety day period. The United States opposed petitioner's motion to reenter judgment but did not allege that it had received a copy of the denial notice prior to the expiration of the ninety day period. The CAFC did not contend in its denial of petitioner's motion to reenter judgment that either (1) any counsel timely received a copy of the denial notice, or (2) the denial notice was timely mailed by the CAFC.

so that petitioner may have the opportunity for further judicial review; and (2) provide reasons for its initial decision so that petitioner might know the legal basis of the CAFC's non-infringement conclusion.

Basis for Federal Jurisdiction in the United States Claims Court

Jurisdiction in the United States Claims Court was founded upon 28 USC §1498.

Reasons for Granting the Writ

I

The CAFC Abused Its Discretion in Failing to Reenter Judgment.

The relief requested via the instant petition is available only in this Court. The CAFC's failure to timely serve counsel and its refusal to reenter judgment constitute exceptional circumstances warranting the exercise of this Court's discretion. Absent the exercise of that discretion, petitioner will be precluded from seeking further relief from this Court. The CAFC should not be permitted to insulate its decision from the review procedure provided by statute by failing to notify the parties of the entry of judgment and then refusing to reenter judgment to allow petitioner the opportunity to request that review. No other relief is available to petitioner.

The granting of the instant petition is in aid of this Court's appellate jurisdiction. *Ex Parte United States,*

287 U.S. 241 (1932). Absent the granting of the instant petition, this Court will have no certiorari jurisdiction over petitioner.

II

The CAFC Should Be Ordered to Provide Reasons for Its Decision.

A. Background of the CAFC

The CAFC was created by the Federal Courts Improvement Act (hereinafter "the Act") of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), which became law on April 2, 1982. That Court came into existence on October 1, 1982 and has nationwide jurisdiction of appeals from various tribunals in certain specialized areas of the law. One such specialized area is that of patent law. The CAFC has appellate jurisdiction over all patent appeals, including appeals from the Patent Office, the International Trade Commission, and all district courts.

The legislative history of the Act indicates that one important objective of the legislature in establishing the CAFC was to "produce desirable uniformity in this area of the law [i.e., patent law]." The legislature recognized that the complex nature of patent litigation was such that a comparatively lighter workload per judgeship would be needed since fewer patent cases would be susceptible to summary disposition:

> "Although the workload per judgeship will be lighter here than in the other circuits, a reduced number of appeals is desirable for this court. The Court of Appeals for the Federal Circuit will be considering cases

that are unusually complex and technical. Consequently, its cases will be extraordinarily time-consuming, and fewer of them will be appropriate for summary disposition than is true of the cases that make up the dockets of the regional courts of appeals. In addition it is important that the newly created court with nationwide jurisdiction not be initially overloaded. Decisions of this court will have precedential effect throughout the country; it is important for the judges of the court to have adequate time for thorough discussion and deliberation."

Thus the "raison d'etre" of this specialized nationwide court of appeals, at least as far as the patent law is concerned, was to provide uniform justice by judges skilled in the peculiarities of patent law. What has been achieved, petitioner submits, is a CAFC which frustrates this expressed purpose. Uniformity is not provided by an opinion like that of Appendix A. The only end that is furthered by such an opinion is that of judicial economy. Petitioner submits, however, that the interests of justice and the goal of guidance to the parties, bar, and public should not be sacrificed in the name of judicial economy.

The CAFC was provided with a lighter workload per judgeship. That additional time should be reflected in well-reasoned opinions or at least opinions with reasons.

B. Fundamental Fairness Requires That the CAFC Set Forth the Reasons Upon Which Its Decision Is Based.

A party must know why he lost if further judicial review is still available to the party. One cannot argue that a lower court erred if one does not know the reason for the

decision. The instant case involves several substantive legal issues, some of first impression, and many interrelated in the sense that the decision on one sub-issue will affect the outcome of the main issue.

The Trial Judge in the instant case applied substantive law which, petitioner submits, is directly opposed to CAFC precedent. Were the CAFC to *adopt* the Trial Judge's opinion, it would, in effect, overrule certain CAFC precedent.[3] The CAFC did *not* adopt the Trial Judge's opinion; it merely affirmed the result, indicating implicitly by the failure to adopt, and expressly by the stated language, that it did not agree *in toto* with the Trial Judge's reasoning.[4] Consequently, petitioner does not know the legal basis for the decision and is powerless to either seek substantive reconsideration in the CAFC or review in this Court based upon an alleged legal error.

The importance of *reasons* in an opinion has been succinctly set forth in an article in a recent issue of "Litigation", the Journal published by the Litigation section of the ABA. *See* "The Law Clerk Explosion", 9 Litigation 20 (1983). While the importance of providing reasons is addressed by the author of that article in the context of a somewhat different proposition (the proposition that

3. For example, *Hughes Aircraft Co.* v. *United States*, —— F.2d ——, 208 USPQ 785 (Ct. Cls. 1980), CAFC precedent in view of *South Corp.* v. *United States*, —— F.2d ——, 215 USPQ 657 (CAFC 1982), requires that limitations not be read into patent claims. The same Trial Judge improperly read limitations into claims in both *Hughes* (where his decision was reversed) and the instant case (where his decision was affirmed).

4. The third sentence of the CAFC opinion (*see* Appendix A) on the appeal reads: "*Without* adopting that opinion, we agree *generally* with its substance and the reasons it gives for the conclusion". [Emphasis added].

judges, not law clerks, should write opinions) from that herein, the rationale nevertheless applies to the instant case. The Litigation article states:

> "The function of judicial opinions is not just to report the result or provide grist for the academic, but also to keep judges honest. Judges are an anomaly in our government. For the most part they are not accountable for their actions, which is why we require them to explain why they do what they do. Society controls them with the prospect of public scorn, or reversal by a higher court, if they act arbitrarily. An opinion in which a judge works to state his reasons fulfills this function. An opinion that is a staff product, simply providing a rationale for a predetermined result based on gut feeling, is not.
>
> Moreover, it is a healthy and necessary part of the decisional process that a judge should participate substantially in preparing his own opinions. *Nearly every lawyer has had the experience of trying to express an idea on paper and finding that it will not hold together. The experience can change the idea. If the judge does not have to participate in that intellectual testing,* leaving it instead to a clerk who is following orders, *then cases may be decided differently than the judge himself would have on deeper reflection.*" [*Id.* at 20-21; emphasis added].

Later on in the same article, it is stated:

> "This process [the judge providing the decision but not participating in the preparation of the opinion] omits the opportunity for the judge to change his mind. He may reflect about the case some more; his colleagues on a collegial court may persuade him; his law clerk may persuade him, or *when the judge sits down to write his opinion, he may find that it simply won't write.* The large staff model means that a lesser per-

sonal relationship offers less chance for the law clerk to change the judge's mind; it means the judge will probably not be lying awake nights thinking about the case, because he will have passed off the writing task to someone else. *He surely will not stumble over the unsuitability of the opinion, because he won't have to compose it. These are not fanciful concerns. Judges do change their mind (not often, but I have seen it happen), and some judges have said in public that an important vehicle for a change can be the need to write a comprehensible opinion. When that part of the discipline of being a judge is sloughed off, then the legitimacy of the judiciary is to that extent diminished.*" [*Id.* at 24; emphasis added].

If the CAFC attempted to provide reasons for its decision in this case, petitioner respectfully submits that either the decision would be different or certain CAFC precedent would have to be expressly reversed, since those reasons would necessarily conflict with CAFC precedent.

C. Interests of Judicial Economy Should Not Outweigh a Party's Right to Know the Reasons Underlying a Decision.

Judicial economy is the obvious reason that the CAFC (and its Court of Customs and Patent Appeals predecessor under the same Chief Judge) has adopted a policy of publishing only a minimal number of opinions.[5] This policy is grounded on the premise that a case that is not of interest legally is not worthy of publication. A case that is not published by the CAFC contains only scant, if any, factual background and very little, if any, legal analysis. Accord-

5. Chief Judge Markey stated at the CAFC Judicial Conference on May 20, 1983 that only 33% of the CAFC's opinions are published.

ing to Chief Judge Markey (during his talk at the CAFC Judicial Conference on May 20, 1983), an unpublished opinion should still provide the underlying reasons for the decision. The CAFC has not followed that policy, however. The opinion in the instant case (*see* Appendix A), it is submitted, is illustrative of the kind of opinion which the CAFC will continue to provide in the name of judicial economy absent some direction from this Court.

The CAFC is the one Court to which *all* patent solicitors and litigators must now look for guidance. Absent published opinions, there will be no guidance. Absent opinions with *reasons*, there will be injustice to litigants.

Petitioner's complaint is that the CAFC is carrying judicial economy too far at the expense of guidance to the bar and fairness to the parties.[6] That complaint is shared by a broad cross-section of the patent bar. *See, for example*, Appendix D, which is a letter from patent counsel at Exxon Corporation to the President of the American Patent Law Association concerning the issues raised in the instant petition.

The CAFC is still in its infancy. Guidance should be provided by this Court during this infancy stage so that the purposes envisioned by the authors of the legislation establishing the CAFC might be fulfilled.

6. Petitioner submits that, when one views the broad picture, judicial economy is actually promoted by the issuance of well-reasoned opinions since such opinions would tend to decrease the number of petitions for reconsideration and petitions for writs of certiorari since the losing party, while unhappy with the result, can at least understand the rationale underlying that result.

Conclusions

This Court is respectfully requested to order the CAFC to (1) reenter judgment so that petitioner may either request reconsideration in the CAFC or review of the CAFC decision in this Court, and (2) provide reasons for its decision.

Petitioner respectfully submits that this petition is meritorious and should be granted.

Respectfully submitted,

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60 East 42nd Street
New York, New York 10165
(212) 986-2480
Attorney for Petitioner

Dated: September 1, 1983

APPENDICES

APPENDIX A

Decision of the United States Court of Appeals for the Federal Circuit

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 393-73

DAVID PELTON MOORE, BY MICHAEL R.P. MOORE AND BARBARA R.P. MOORE,*

Appellant,

v.

THE UNITED STATES,

Appellee.

DECIDED: January 4, 1983

Before MARKEY, *Chief Judge*, RICH and DAVIS, *Circuit Judges*. PER CURIAM.

* David Pelton Moore, originally the sole plaintiff, died before this appeal was argued and, by order of December 29, 1982, the court substituted "David Pelton Moore, by Michael R.P. Moore and Barbara R.P. Moore".

DECISION

The judgment* of the United States Claims Court dismissing appellant's petition is *affirmed*.

OPINION

This is a patent infringement suit against the Government, under 28 U.S.C. § 1498, involving United States Reissue Patent No. 26,108 (the Moore patent), entitled "Solid Explosive Composition and Method of Preparation Employing Vulcanized Rubber and a Solid Inorganic Oxidizing Salt." In his opinion of August 12, 1981 and the subsequent judgment, Judge Colaianni held that plaintiff had failed to prove infringement of his patent by any of the accused processes or the accused compositions, either under the doctrine of equivalents or otherwise. Without adopting that opinion, we agree generally with its substance and the reasons it gives for the conclusion. It is unnecessary to consider the other defenses argued by appellee (assuming that they are properly before us) and we do not reach those other defenses.

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* Pursuant to the order of this court dated October 4, 1982, the Claims Court subsequently entered a final judgment in accordance with Trial Judge Colaianni's recommended decision of August 12, 1981.

APPENDIX B

Judgment of the United States Court of Appeals for the Federal Circuit

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 393-73

DAVID PELTON MOORE, BY MICHAEL R. P. MOORE AND BARBARA R. P. MOORE,

Appellant,

v.

THE UNITED STATES,

Appellee.

JUDGMENT

ON APPEAL from the United States Claims Court. This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED.

ENTERED BY ORDER OF THE COURT

George E. Hutchinson, Clerk
/s/ GEORGE E. HUTCHINSON

Clerk

DATED *January 4, 1983*
The Petition for rehearing and Suggestion for Rehearing En Banc; DENIED, February 9, 1983.

A true copy GEORGE E. HUTCHINSON, test:
Clerk, United States Court of Appeals for the Federal Circuit
Certified this day of 19
By /s/ W. RICHARD SIENKIEWICH

ISSUED AS A MANDATE: February 18, 1983

APPENDIX C

Order of the United States Court of Appeals for the Federal Circuit

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Appeal No. 393-73

DAVID PELTON MOORE, by MICHAEL R. P. MOORE, and BARBARA R. P. MOORE

Appellants,

v.

THE UNITED STATES

Appellee.

Before MARKEY, *Chief Judge.*

ORDER

Having considered the motion of appellants to reenter judgment and appellee's reply thereto;

IT IS ORDERED that the motion be, and the same is hereby, denied.

FOR THE COURT

/s/ HOWARD T. MARKEY

Howard T. Markey
Chief Judge

6 June 83

Date

APPENDIX D

Letter Dated April 26, 1983

COMMITTEE CORRESPONDENCE

83LD 3666

Reply to: ALBERT P. HALLUIN
(201) 765-4666

Committee APLA Chemical Practice

Exxon Research and Engineering Company
P.O. Box 390, Florham Park, N.J. 07932

Re: CAFC

April 26, 1983

Leonard B. Mackey, Esq.
International Telephone
and Telegraph Company
320 Park Avenue
New York, New York 10022

Dear Len:

You are aware that we have subcommittees monitoring the CAFC. I am receiving comments from our membership on the quality of decisions and opinions coming from the CAFC. It is one thing that approximately 70% of all cases pending before the CAFC are decided by *unpublished* opinions (see APLA Bulletin, March-April, 1983, page 203); it is quite another matter where the opinion, whether published or not, is a brief decision that fails to address the issues raised in the appeal.

Members of our committee complain that they and their clients are not getting their money's worth, whether they win or lose. They have a concern of going through the rather expensive appeal process only to receive a 2-page decision, now commonly called a "Markey-Gram".

The broader picture is what this practice will do to the body of patent law and stare decisis. The CAFC is the *only appellate patent* court. Many of us worked many hours, days and months for enactment of the enabling legislation for this new court. I, for one, spent a great deal of time. We did not intend this court to be a "rubber stamp" court or one which issued a plurality of per curium opinions. With most of the decisions being unpublished, the problem does not surface. Also, by issuing such short decisions, the court is able to stay current and there is no justification for getting additional help.

I suggest that APLA undertake a study of the courts published and unpublished decisions. This study could form the basis of a report by our Association. Perhaps this undertaking would bring about corrective action before too much damage is done.

I am providing a copy of this letter to Messrs. Dunner, Jancin and Whitney since they also have a vested interest in this new court and may wish to share their views with us.

Please let me know if I can be of assistance to you in this matter or if you have any questions. The Chemical Practice Committee intends to focus on this topic at the Annual Meeting.

Very truly yours,

/s/ AL
Albert P. Halluin

APH:ah

c: R. B. Benson, Esq.
M. W. Blommer, Esq.
D. R. Dunner, Esq.
E. V. Filardi, Esq.
J. Jancin, Jr., Esq.
J. E. Maurer, Esq.
B. R. Pravell, Esq.
T. F. Smegal, Jr., Esq.
G. W. Whitney, Esq.

No. 83-365

In the Supreme Court of the United States

OCTOBER TERM, 1983

IN RE DAVID PELTON MOORE, BY
MICHAEL R.P. MOORE AND
BARBARA R.P. MOORE, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-365

IN RE DAVID PELTON MOORE, BY
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BARBARA R.P. MOORE, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek a writ of mandamus to compel the United States Court of Appeals for the Federal Circuit (1) to re-enter its order denying rehearing so that petitioners can file a timely petition for certiorari from the court's judgment, and (2) to provide additional reasons to support its judgment. Petitioners have failed to satisfy the standards for the granting of an extraordinary writ.

1. Petitioners' decedent brought this patent infringement suit against the United States, seeking compensation for the allegedly unauthorized use of the invention claimed in his United States Reissue Patent No. 26,108, entitled "Solid Explosive Composition and Method of Preparation Employing Vulcanized Rubber and a Solid Inorganic Oxidizing Salt." The plaintiff's contention was that certain rocket and missile propellants used by or for the United States, and the processes used in making them, infringed his patent. The

trial judge for the Court of Claims issued a 14-page opinion recommending dismissal of the suit, on the ground that the alleged infingement had not been proven. 211 U.S.P.Q. 800 (1981). This recommended decision was subsequently adopted by the then reconstituted United States Claims Court (see Pet. App. 2a n.*).

The court of appeals affirmed. Although the court did not "adopt[]" the trial court's opinion, it "agree[d] generally with its substance and the reasons it gives for the conclusion" (Pet. App. 2a). Petitioners, who were substituted as appellants after plaintiff's death, filed a timely petition for rehearing, dated January 21, 1983. That petition was denied on February 9, 1983 (Pet. App. 3a), and the denial was duly entered on the public record on that date.

On May 18, 1983, petitioners filed a motion to reenter judgment in the court below. The basis for the motion was that "[a] copy of the denial of the Petition For Rehearing * * * was not received by counsel for appellant[s] until May 16, at which time a Petition For Writ Of Certiorari could not be timely filed with the Supreme Court" (Motion to Reenter at 1). In an affidavit attached to the motion, counsel for petitioners stated: 'The denial of the Petition For Rehearing * * * dated February 9, 1983, was first received in this office on May 16, 1983" (Affidavit at 1 para. 3).[1]

On June 6, 1983, the court of appeals denied the motion to reenter judgment (Pet. App. 4a), and on August 28 —some 83 days later—petitioners filed a petition for mandamus in this Court.

2. Petitioners' first contention is that the court of appeals should be compelled to reenter judgment in order to accord them an opportunity to file a petition for a writ of

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[1] We have lodged a copy of this motion and affidavit with the Clerk of this Court.

certiorari, since the asserted failure of the clerk of the court of appeals to send them timely notice of the denial of rehearing effectively deprived them of their original opportunity to do so. However, 28 U.S.C. 2101(c) provides that the time for filing a petition for a writ of certiorari runs from "the entry of [a] judgment or decree." Supreme Court Rule 20.4 further provides that the time for filing runs from the "date of the denial of rehearing" in cases in which a timely petition for rehearing is denied by the lower court. Neither the statute nor the rule calculates the running of time from *notice* of the denial of rehearing. Ordinarily, reentry of judgment by a court of appeals does not enlarge the time for filing of a petition under 28 U.S.C. 2101(c) (*FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952)), and the circumstances of this case do not compel an exception. Cf. *Durham* v. *United States*, 401 U.S. 481, 481-482 (1971); *Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969).[2]

There is no reason why, with due diligence, petitioners' counsel could not have discovered the denial of their petition for rehearing in time to seek certiorari. As noted above, the denial of rehearing was entered on the court's public docket on February 9, 1983. Moreover, petitions for rehearing in the Court of Appeals for the Federal Circuit and its predecessor courts have generally been decided quickly, and an attorney familiar with practice before that court should not allow over four months to pass before inquiring about the status of a petition for rehearing, as happened in

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[2]See also *Hill* v. *Hawes*, 320 U.S. 520 (1944). In *Hill*, the Court held that a district court can extend the time for taking an appeal by reentering the judgment, where the losing party's opportunity to appeal would otherwise lapse before he had received notice of an adverse decision. The result in *Hill* was overturned by a 1946 amendment to the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 77(d) and the advisory committee notes thereto.

this case.[3] By contrast, in *Durham*, the petitioner had inquired about the status of his petition for rehearing and had been specifically informed that the court would notify him "as soon as the court acted." Several months later, he inquired again, only to be informed that his petition for rehearing had been denied six months before. 401 U.S. at 481-482. See also *Hensley* v. *Chesapeake & O. Ry.*, 651 F.2d 226, 229-231 (4th Cir. 1981). Petitioners have not cited any similar circumstances or other reasons suggesting why they should be granted special relief. Their claim thus reduces to an argument for a per se extension of time to file a petition for certiorari in any case in which timely notice is not provided of a denial of rehearing, whether or not due diligence was exercised in seeking notice. The court of appeals' denial of petitioners' motion for reentry of judgment was not, therefore, an abuse of discretion warranting issuance of a writ of mandamus.

Moreover, petitioners' claim to mandamus relief is weakened by their 83-day delay before filing a mandamus petition with this Court. Cf. *Hill* v. *Hawes*, 320 U.S. 520, 521 (1944) (relief sought seven days after notice of appeal time had run); *Durham*, 401 U.S. at 481-482 (certiorari petition filed three weeks after untimely receipt of order denying rehearing). Although there are no strict time limits on requests for extraordinary relief, the Court, in exercising its discretion, should consider whether the petitioner has moved expeditiously. See *United States* v. *Braasch*, 542 F.2d 442, 444 (7th Cir. 1976).

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[3]We do not suggest that attorneys must deluge the courts of appeals with periodic inquiries about the status of petitions for rehearing in order to protect against the rare instance in which the clerk of the court may fail to provide notice. However, it is reasonable to expect an attorney to make inquiry after months have elapsed, in view of the time limit imposed by 28 U.S.C. 2101(c), which is jurisdictional. See *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

3. Petitioners' objection to the adequacy of the court of appeals' opinion is premature. If afforded an opportunity to file a petition for certiorari, they can seek to have the judgment vacated and remanded for fuller explication at that time. In any event, mandamus is not available to compel a court of appeals to write a more expansive opinion. The court here expressly adopted the substance and reasons of the trial court's opinion, although it stopped short of adopting its language. The court of appeals thereby apprised counsel and his clients of the basis for its action.

It is therefore respectfully submitted that the petition for a writ of mandamus should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983

DOJ-1983-10